(4)

No. 87-519

In The

Supreme Court of the United States

October Term, 1987

GARY D. MAYNARD, and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1987
CERTIORARI GRANTED JANUARY 11, 1988

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10-20-82	Jury returns verdict of guilty for crimes of Murder in the First Degree and Shooting With Intent to Kill.
10-21-82	Jury returns verdict imposing the punishment of death for the conviction of Murder in the First Degree.
10-25-82	Defendant is formally sentenced to death in accordance with the jury's verdict.
1- 7-85	Oklahoma Court of Criminal Appeals affirms the Defendant's conviction.
7- 1-85	United States Supreme Court denies the Defendant's Petition for Writ of Certiorari in Case No. 84-6171.
8-22-85	Defendant's Application for Post-Conviction Relief filed in the District Court of Muskogee County is denied.
10-23-85	Oklahoma Court of Criminal Appeals affirms the denial of the Defendant's Application for Post-Conviction Relief in Case No. PC-85-594. That opinion is reported as *Cartwright v. State*, 708 P.2d 592 (Okla. Crim. App. 1985).
1-13-86	United States Supreme Court denies Defendant's Second Petition for Writ of Certiorari in Case No. 85-5846.

Date	Description
2-11-86	United States District Court for the Eastern District of Oklahoma denies Defendant's Petition for a Federal Writ of Habeas Corpus.
9-29-86	United States Court of Appeals for the Tenth Circuit affirms the District Court's denial of the Petitioner's Petition for a Federal Writ of Habeas Corpus. That opinion is reported as *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986).
6-22-87	An en banc panel of the United States Court of Appeals for the Tenth Circuit vacates the original panel's opinion and vacates Defendant's death sentence in his appeal of the denial of his Petition for a Federal Writ of Habeas Corpus in Part. That opinion is reported as *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987) (en banc).

IN THE DISTRICT COURT IN AND FOR
MUSKOGEE COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	CASE NO.:
	)	CRF-82-192
WILLIAM THOMAS CARTWRIGHT,	)	CRF-82-178
Defendant	)	

(Filed May, 1982, 9:29 A.M.)

NADINE HARNAGE, COURT CLERK

21-701.7 21-652

INFORMATION For COUNT 1: MURDER IN THE FIRST DEGREE COUNT 2: SHOOTING WITH THE INTENT TO KILL

INFORMATION

STATE OF OKLAHOMA, COUNTY OF MUSKOGEE, ss:

I, the undersigned District Attorney of said county, in the name, by the authority, and on behalf of the State of Oklahoma, give information that on about the 4th day of May A.D., 1982 in said County of Muskogee and State of Oklahoma, one WILLIAM THOMAS M. CARTWRIGHT did then and there unlawfully, wrongfully, willfully

COUNT I: that is to say, the said defendant, in the county and state aforesaid and on the day and year aforesaid, then and there being, with malice aforethought, did then and there wilfully, unlawfully and feloniously, without authority of law, effect the death of Hugh Riddle by then and there shooting him with a certain gun, to-wit: 20 gauge shotgun, of unknown brand name, then and there

and thereby inflicting certain mortal wounds in the body of the said Hugh Riddle, from which mortal wounds the same Hugh Riddle did languish and die on the 4th day of May, 1982,

COUNT 2: intentionally and feloniously shoot one Charma Riddle with a firearm, to-wit: a 20 gauge shotgun, the same being a deadly weapon loaded with gunpowder and shot, held in the hands of the said defendant and which he wrongfully and intentionally pointed, aimed and fired at the said Charma Riddle the pellets therefrom striking, penetrating and causing wounds in the body of the said Charma Riddle with the unlawful, wrongful, wilful and felonious intent then and there on the part of said defendant to kill said Charma Riddle, contrary to the form and statute in such cases made and provided and against the peace and dignity of the state.

STATE OF OKLAHOMA, COUNTY OF MUSKOGEE, ss:

I do hereby solemnly swear that I have read the above and foregoing information, know the content thereof, and that the statements therein contained are true.

X W.A. Edmonson
Subscribed and sworn to before me this 5th day of May, 1982.
NADINE HARNAGE,
COURT CLERK

BY: DEPUTY COURT CLERK
PAULA SIXTH

I hereby state that I have examined the facts herein and recommend that a warrant issue.

MICHAEL C. TURPEN,
DISTRICT ATTORNEY

BY: ILLEGIBLE
OFFICE OF THE DISTRICT ATTORNEY

WITNESSES FOR THE STATE OF OKLAHOMA

CHARMA RIDDLE, Fern Mtn. Rd., Muskogee, Oklahoma 68-30396

CHICK HAMILTON, 420 N. "M", Muskogee, Oklahoma 68-70990

LT. TOM SPRIGGS, MPD, CITY
CARL KELLY, MPD, CITY
MARK PEASE, MSO, CITY
GARY STURM, DISTRICT ATTORNEY OFFICE, CITY

BILL CARTWRIGHT, Rt. 4, Box 562, Muskogee, Oklahoma 68-70659

BETTY CARTWRIGHT, Rt. 4, Box 562, Muskogee, Oklahoma 68-70659

MEDICAL EXAMINER
EMERGENCY DOCTOR, MGH, DR. PAUL COCHRAN, CITY 68-25501

IN THE DISTRICT COURT OF
MUSKOGEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	(Filed October 5,
	)	
PLAINTIFF,	)	1982 - 12:19 PM)
	)	
—VS—	)	NO. CRF-82-192
	)	
WILLIAM THOMAS CARTWRIGHT,	)	Nadine Harnage Court Cierk
	)	
DEFENDANT,	)	

AMENDED

NOTICE OF AGGRAVATING CIRCUMSTANCES
AND
BILL OF PARTICULARS

COMES NOW THE STATE OF OKLAHOMA, by and through the Office of the District Attorney and hereby serves notice that the State intends, pursuant to 21 OSA, Section 701.12, to show the following aggravating circumstances to justify imposition of the death penalty in the above-styled case:

1. The Defendant knowingly created a great risk of death to more than one person; to-wit: that there was another person in the home, Charma Riddle, who was severely injured and left for dead by the Defendant herein.

2. The murder was especially heinous, atrocious, or cruel for the following reasons, to-wit: that the offense took place within the home of the deceased, at night; that the deceased was only 30 years of age; that the close range shotgun blast

inflicted great pain and suffering; that the Defendant took steps to insure that his victim received no aid; and that the Defendant stalked the deceased for an extended period of time prior to the murder.

3. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; for the following reasons, to-wit: that following the fatal shot, the Defendant went to great lengths to effect the death of another individual, Charma Riddle, by slashing her throat, stabbing her body, and cutting off all avenues of aid or assistance known to the Defendant; and, further, that the Defendant attempted to effect his escape in the possession of two firearms stolen from the victims herein.

/s/ _____
W.A. EDMONDSON
FIRST ASSISTANT DISTRICT ATTORNEY

Dated this 5th day of October, 1982.

CERTIFICATE OF MAILING

I, W.A. Edmondson, do hereby certify that a copy of the foregoing Amended Notice of Aggravating Circumstances and Bill of Particulars was mailed, by prepaid U.S. Mail, to John Garrett, attorney for the Defendant herein, on the 5th day of October, 1982, at the address of 502 Court Street, Muskogee, OK 74401.

/s/ _____
W.A. EDMONDSON
FIRST ASSISTANT DISTRICT ATTORNEY

IN THE DISTRICT COURT OF
CHEROKEE COUNTY,
STATE OF OKLAHOMA.

STATE OF OKLAHOMA, PLAINTIFF, -vs- WILLIAM THOMAS CARTWRIGHT, DEFENDANT.	)	CASE NO. CRF-82-178

VERDICT

(Filed October 20, 1982)

We, the jury, duly empaneled upon our oaths, upon *Count 1* find the Defendant William Thomas Cartwright guilty of Murder in the First Degree.

/s/ Bob J. Musgrave
FOREMAN

IN THE DISTRICT COURT
OF CHEROKEE COUNTY,
STATE OF OKLAHOMA.

STATE OF OKLAHOMA, PLAINTIFF, -vs- WILLIAM THOMAS CARTWRIGHT, DEFENDANT.	)	CASE NO. CRF-82-178

VERDICT

(Filed October 20, 1982)

We, the jury, duly empaneled upon our oaths, upon *Count 2* find the Defendant William Thomas Cartwright guilty of Shooting with Intent to Kill and fix his punishment at 75 years.

/s/ Bob J. Musgrove
FOREMAN

INSTRUCTION NO. 12

The defendant in this case has been found guilty by you, the jury, of the offense of Murder in the First Degree. It is now your duty to determine the penalty to be imposed for this offense.

Under the law of the State of Oklahoma, every person found guilty of Murder in the First Degree shall be punished by death or imprisonment for life.

INSTRUCTION NO. 13

In the sentencing stage of this trial, the State has filed a document called a Bill of Particulars. In this Bill of Particulars, the State alleges the defendant should be punished by death, because of the following aggravating circumstances:

1. The defendant knowingly created a great risk of death to more than one person;
2. The murder was especially heinous, atrocious, or cruel; and
3. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

INSTRUCTION NO. 14

The defendant has entered a plea of not guilty to the allegations of this Bill of Particulars, which casts on the

State the burden of proving the material allegations in this Bill of Particulars beyond a reasonable doubt.

This Bill of Particulars simply states the grounds upon which the State seeks imposition of the death penalty. It sets forth in a formal way the aggravating circumstances of which the defendant is accused. It is, in itself, not evidence that any aggravating circumstances exists, and you must not allow yourselves to be influenced against the defendant by reason of the filing of this Bill of Particulars.

The defendant is presumed to be innocent of the charges made against him in the Bill of Particulars, and innocent of each and every material element of said charges, and this presumption of innocence continues unless his guilt is established beyond a reasonable doubt. If, upon consideration of all the evidence, facts, and circumstances in the case, you entertain a reasonable doubt of the guilt of the defendant of the charges made against him in the Bill of Particulars, you must give him the benefit of that doubt and return a sentence of life imprisonment.

INSTRUCTION NO. 15

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt,

you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life.

INSTRUCTION NO. 16

As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

INSTRUCTION NO. 17

Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

INSTRUCTION NO. 17a

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

INSTRUCTION NO. 18

Evidence have been offered to the following mitigating circumstances:

a. The defendant's youth;

b. His prior record as a law abiding citizen;

c. His willingness to have regular employment;

Whether these circumstances exist and whether these circumstances are mitigating must be decided by you.

INSTRUCTION NO. 19

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the law requires that you reduce such findings to writing by stating specifically what aggravating circumstances existed, if any. This finding must be made a part of your verdict.

You must indicate this finding by checking the box next to such aggravating circumstances on the appropriate form furnished you, and such verdict form must be signed by your foreman.

The law does not require you to reduce to writing the mitigating circumstances you find, if any.

INSTRUCTION: 20

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the state and the defendant during the sentencing phase of this proceeding.

All the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them all together and not just a part of them.

You are the determiner of the facts. The importance and worth of the evidence is for you to decide.

I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimated in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances or mitigating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

You must not use any kind of chance in reaching a verdict, but you must rest in on the belief of each of you who agrees with it.

You have already elected a foreman. In the event you assess the death penalty, your verdict must be unanimous. You may also return a unanimous verdict of imprisonment for life. Proper forms of verdict will be given you which you shall use in expressing your decision, when

you have reached a verdict, all of you in a body must return it into open court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

/s/ Hardy Summers
10-21-82

• • •

Excerpts of Closing Argument of the Prosecutor During the Second Stage of the Trial

(Tr. 626-28)

[p. 626] We allege secondly that the murder was especially heinous, atrocious, or cruel for the following reasons: That the offense took place within the home of the deceased at night. There's been no controversy in regard to that fact. No dispute but what the offense took place in the home of the victim at night. That the deceased was only thirty years of age. Ladies and Gentlemen, we did not put on specific evidence as to the age of the deceased. You have his pictures; you've seen his wife. You can gauge at least that he was a young man at the time he was cut down by the defendant's shotgun blast. And I submit that the fact that he was cut down in the prime of his life also tends to make this a particularly atrocious and cruel crime. That the close range shotgun blast inflicted great pain and suffering. That the defendant took steps to insure that his victim received no aid. Recall the photographs. Recall the testimony that after the deceased was shot, and after the other acts took place, the defendant proceeded to cut the telephone cord. Proceeded to cover the windows. Proceeded to place a note on the door saying they would be gone for two weeks. All designed with one purpose in mind. To keep aid from coming to Hugh and Charma Riddle. And I [p. 627] suggest that that makes this offense particularly heinous, atrocious, and cruel. And finally that the defendant stalked the deceased for an extended period of time prior to the murder. Recal' the testimony. The defendant was dropped off at 54th Street on the 3rd. There was no testimony as to where he was the night of the 3rd from any witness other than the defendant himself. And consider what the

Riddles found when they returned home on the 4th. Consider the phone bill which showed that at 11:30 in the morning on the 4th the telephone call was placed to Las Vegas. I suggest that the defendant was in the home at 11:30 that morning. Consider when Charma Riddle went back to the bedroom and tried to make the telephone call. The telephone was unplugged from underneath the bed. I asked her, Did you do that to avoid calls coming in and bothering you? She said, No, we never did that. Who did? I suggest the defendant had been in the house and unplugged the phone prior to any act being committed. Remember Charma's testimony about the television. Did you notice anything unusual when you arrived home? Only that the television was unplugged. Well, how does that work? You turn it on and each successive click of the remote control button causes the volume to go higher. I suggest that someone who was in the house and unfamiliar with that television set was watching it when the Riddles started down the driveway, tried to turn it off and it got [p. 628] louder instead and they pulled the plug on the television because they didn't know how to turn it off. And recall also the statement made by the defendant to Gary Sturm. What were you doing earlier? I was watching them through the window while they were eating dinner. Ladies and Gentlemen, I suggest that this defendant stalked Hugh Riddle for nearly two days before Hugh and Charma Riddle arrived home and he could effect the death of Hugh Riddle.

• • •

IN THE DISTRICT COURT IN AND FOR
CHEROKEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CRF-82-178
	)	
WILLIAM THOMAS CARTRIGHT,	)	
	)	
Defendant.	)	
	)	
	)	

VERDICT

(Filed October 21, 1982)

We, the jury, impaneled and sworn in the above entitled cause, do upon our oaths unanimously find the following statutory aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

√ The defendant knowingly created a great risk of death to more than one person;

√ The murder was especially heinous, atrocious, or cruel;

— The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Bob J. Musgrave
FOREMAN

IN THE DISTRICT COURT IN AND FOR
CHEROKEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CRF-82-178
	)	
WILLIAM THOMAS CARTRIGHT,	)	
	)	
Defendant.	)	
	)	

VERDICT

(Filed October 21, 1982)

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant, William Thomas Cartright, guilty of Murder in the First Degree, fix his punishment at death.

/s/ Bob J. Musgrave
FOREMAN

William Thomas
CARTWRIGHT, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-82-758.

Court of Criminal Appeals of Oklahoma.

Jan. 7, 1985.

Rehearing Denied March 8, 1985.

OPINION

BUSSEY, Presiding Judge:

William Thomas Cartwright was charged in the District Court of Muskogee County, Oklahoma, for the crimes of Murder in the First Degree, and Shooting with Intent to Kill, Case No. CRF-82-192. He was granted a change of venue to Cherokee County, Oklahoma. The jury before which he was tried returned verdicts of guilt on both counts, sentenced him to death for the murder, and to a term of seventy-five years' imprisonment for the shooting. He was sentenced accordingly.

The appellant began working for the victims in this case, Hugh and Charma Riddle, in their Muskogee remodeling business in July of 1981. His employment was terminated in December of that year. According to the appellant, he was fired because he demanded the Riddles pay for an injury he allegedly received on the job. According to Charma Riddle, he was laid off because of lack of business.

The appellant moved to Las Vegas, Nevada in January of 1982. He returned to Muskogee in late April, supposedly believing his claim against the Riddles for injury would be settled. He told a Muskogee acquaintance that he intended to "get even" with the Riddles.

On May 3, 1982, Hugh and Charma Riddle spent the night with Charma's father in Muskogee. They did not return to their rural Muskogee home until the early evening hours of May 4. They ate their evening meal and retired to watch television. As Charma made her way to the bathroom from the living room, she was confronted by a man in her hallway with a shotgun. She grabbed the gun, and the man fired it into her leg. After she fell, she saw her assailant and recognized him as the appellant. He shot her again.

Charma then saw the appellant walk into the living room where Hugh was. She saw the appellant fire two blasts from the shotgun, and heard her husband scream.

The appellant disappeared into the living room, and Charma dragged herself down the hall into a bedroom. She tried to use the telephone, but it was dead. She then began to write her assailant's name on the bedsheet in her blood. She managed to spell the letters TOM CAR.

The appellant entered the bedroom. Charma asked him why he had shot them, and he replied that they should not have fired him. Charma then asked the appellant to help her. The appellant slit her throat and stabbed her with the hunting knife the Riddles had given him for Christmas.

Miraculously still alive, Charma heard the telephone ring in another room. She deduced that the telephone she

had tried to use earlier was only unplugged. She plugged it in and called an operator, who contacted the Muskogee police department. She told the police dispatcher that Tom Cartwright had shot her, and that he was still in the house.

Pursuant to the directions Charma gave, Muskogee County Sheriff's officers and Muskogee police officers arrived at the house. The first officer who arrived observed a man standing outside the Riddle home. The man dodged between trees before disappearing into the darkness. A subsequent search for him was fruitless.

Clothing, weapons and other possessions belonging to the Riddles were found inside their vehicle. Found along with those articles was a silver jacket which was identified as being similar or identical to one the appellant owned.

The officers found the body of Hugh Riddle lying face down in the living room inside the Riddle home. Charma was still in the bedroom. She was taken by ambulance to the Muskogee Hospital. She lived to testify against the appellant at trial.

Two days after the murder/shooting (May 6, 1982), the appellant called his sister from a pay telephone in Muskogee. The sister picked him up, fed him, gave him a change of clothes and called the Muskogee County District Attorney. The District Attorney came to the sister's house, and got the appellant. The appellant was taken to jail, but then was taken to the hospital because he complained of a headache and a leg injury. After a doctor had seen him and prescribed aspirin, the appellant was taken to the courthouse for interrogation. He confessed to the crimes during the interrogation.

The Riddles' telephone bill for the month of May, 1982 was introduced into evidence to demonstrate that at 11:13 a.m. on May 4, a telephone call was placed to a Las Vegas, Nevada telephone number. It was established that the number belonged to the appellant's fiancee.

A note which was found tacked to the door of the Riddle residence by Charma's father on May 6 was introduced into evidence. The note contained several misspellings, and stated that the Riddles had made an emergency trip to Tennessee. Charma testified that although she and Hugh had planned a trip to Tennessee at some point in the coming year, they were not about to make such a trip, and neither of them had written the note. The appellant was requested to write the same words that the note contained at trial. He misspelled several words, including the identical misspelling of the word "such," which was spelled "sutch" in both notes.

The appellant testified that he spoke with Hugh Riddle in the late afternoon of May 4, concerning his alleged injury. Hugh ordered him off his property, and as he turned to leave, he was struck on the head. He stated that he remembered nothing until May 6, when he called his sister.

Upon cross examination, the prosecutor read several excerpts of the appellant's confession for the purpose of impeaching his testimony concerning the two day "blackout." The appellant stated he did not remember making any of the statements.

The appellant presented lay testimony that, due to a childhood injury, he had a "soft spot" on his head, which,

when touched, caused him to "black out." Also, several relatives, employees, supervisors and co-workers testified that he was a good worker, and that he was not a violent person.

The appellant first complains that the confession he made on May 7 was involuntary, and therefore inadmissible for any purpose, because he was not aware he was talking to law enforcement authorities. He contends that he consented to interrogation by the District Attorney because he was convinced by his sister that the District Attorney was an attorney who wanted to help him.[1]

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1. The appellant's contact with the Muskogee County District Attorney (hereinafter called the D.A.) was engineered by his sister, Dovie Field. Shortly after the murder/shootings, a close friend of the Riddles contacted Dovie and threatened to kill her and her brother. She contacted the police who, after some investigation, told her to file a complaint at the courthouse. At the courthouse, the D.A.'s secretary learned who Dovie was, and directed her to the D.A.'s office. Dovie and the D.A. discussed the appellant, and she agreed to contact the D.A. when she saw him. According to Dovie, at that time she knew the D.A. was a District Attorney, but thought that meant he was a "higher up attorney"; and that he wanted to help the appellant.

Approximately one hour after Dovie picked the appellant up on May 6, she persuaded the appellant to meet with the D.A. She then called the D.A., told him the appellant was at her home, and admonished him to bring no police or guns. When the D.A. arrived, Dovie's husband, Steve, asked the D.A. if he were the prosecuting attorney. The D.A. replied that he was a prosecutor, but that he did not know whether he would be prosecuting the appellant's case. Dovie, the appellant and the D.A. then drove to the police station in the D.A.'s car. Steve followed along behind in his.

The appellant was taken from the police station to the hospital by the D.A., an investigator for the D.A. and a uni-

(Continued on following page)

From a review of the testimony had at trial and on the motion to suppress the confession, we are convinced that the circumstances surrounding the appellant's interrogation indicate that he was coherent, and doubtless knew that he was dealing with law enforcement officials.[2]

The portions of the confession were therefore properly utilized for purposes of impeachment. No objection was made to the trial court's instructions concerning the substantive use of the confession, or to the prosecutor's remarks concerning such use. Thus, any error was waived. *Jetton v. State*, 632 P.2d 432 (Okl.Cr.1981). Moreover, in view of both the direct and circumstantial evidence of the appellant's guilt independent of the portions of the confession used at trial, we are convinced that any possible error which may have occurred was harmless beyond a

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(Continued from previous page)

formed policeman. A doctor examined the appellant, suggested he take some aspirin and released him. Hospital personnel testified at trial that the appellant was coherent. When asked, the appellant agreed to talk, and chose to go to the courthouse rather than back to jail. On the way, the appellant observed and commented upon an accident they passed. Inside the courthouse, the appellant was informed that his interrogator was an investigator for the D.A., and he acknowledged the presence of the uniformed police officer. He was read his rights. He signed a written waiver, and acknowledged the police officer's signature as a witness.

2. See footnote 1, infra.

It is also interesting to note that the appellant testified that he was abused as he climbed the stairs to the courthouse, that he was shouted at prior to the tape recorded interrogation and that he was told the uniformed police officer saw only what he was told to see. Without deciding whether the allegations are true, we would only comment that these circumstances support the conclusion that the appellant knew he was not in the hands of a defense attorney.

reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Coleman v. State*, 668 P.2d 1126 (Okl.Cr.1983).

The appellant's third assignment of error is that the failure to file a bill of particulars by the time of the preliminary hearing, or to present evidence in support thereof at the preliminary hearing, deprived the trial court of jurisdiction to sentence him to death. We have previously held that defendants in capital cases are not entitled to preliminary hearings on bills of particular. *Stafford v. State*, 669 P.2d 285 (Okl.Cr.1983), vacated and remanded on other grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984); *Coleman*, supra; *Johnson v. State*, 665 P.2d 815 (Okl.Cr.1983); *Brewer v. State*, 650 P.2d 54 (Okl.Cr. 1982). The bill of particulars, filed on October 4, 1982, complied with the requirements of 21 O.S.1981, § 701.10.[3] The allegations contained therein consisted of the facts of the case, and inferences permissibly drawn therefrom. Further, we do not believe there was any surprise or prejudice to the appellant, since trial counsel neither raised an objection concerning the matter prior to trial or in the motion for new trial. The allegation is without merit.

The appellant's second assignment of error is that the trial court erroneously failed to instruct the jury that the trial court would impose a life sentence if a unanimous verdict were not reached on the issue of punishment.

The instructions given by the trial court accurately and adequately addressed the matter. The instructions stated, in pertinent part:

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3. Title 21 O.S.1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life. (Instr. No. 15, Tr. 620).

• • •

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed. (Instr. No. 17(a), Tr. 621).

This assignment of error has no merit.

The appellant's ninth allegation of error proceeds upon the following two premises: first, in the guilt stage, the trial court ruled certain testimony by the appellant's mother and sister inadmissible;[4] and second, all the testimony presented by the appellant in the guilt stage was incorporated by stipulation as mitigating evidence in the punishment stage. Citing *Lockett v. Ohio*, 438 U.S. 586,

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4. The trial court refused to allow the appellant's mother to testify to the appellant's character and disposition as compared to his siblings'. The mother was allowed to testify, as were several other witnesses, that the appellant had a non-violent disposition.

The trial court also refused to allow the appellant's sister to give testimony in rebuttal, which defense counsel admitted would be nothing different or new from her testimony given during the case in chief.

98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), appellate counsel therefore concludes that, by virtue of the trial court's rulings in the guilt stage, the appellant's right to present evidence in mitigation of the death penalty was unconstitutionally curtailed.

The trial court's rulings in the guilt stage were correct. See, 12 O.S.1981, § 2403, footnote 4 supra. Additionally, there is no argument in either the record or upon this appeal to indicate that counsel was, or even considered himself to be, prohibited from presenting that evidence in the second stage, had he thought it necessary or useful. The argument that alleged error was "bootstrapped" into the punishment stage by a voluntary stipulation is utterly devoid of merit.

We now turn to our statutorily mandated review of whether the sentence of death was appropriate in this case. See, 21 O.S.1981, § 701.13(C)(1-3).

We first find from a review of the transcript that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The appellant was granted a change of venue to ensure his trial was removed from the arena of public prejudice in Muskogee County. The trial court, prosecutor and defense counsel all performed their duties admirably, and the appellant received a fair trial.

Secondly, we must determine whether the evidence supported the jury's determination that the murder of Hugh Riddle was especially heinous, atrocious or cruel, and that the appellant knowingly created a risk of death to more than one person. The appellant has also raised

these considerations in his fourth and sixth allegations of error, respectively.

In assessing whether the murder was especially heinous, atrocious or cruel, the appellant would have us consider the shooting as an isolated event, to-wit: that the appellant walked into a room and shot Hugh Riddle at close range with a shotgun, killing him almost immediately. He would therefore have us conclude under *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982) that the murder was not tortuous, and therefore was not especially heinous, atrocious or cruel.

According to the plurality in *Godfrey v. Georgia*, the Georgia Supreme Court had defined the aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" essentially to mean that torture must have been involved in the murder. *Godfrey*, 446 U.S. at 431, 100 S.Ct. at 1766. This Court has not defined the "especially heinous atrocious or cruel" aggravating circumstance in such a manner. The statute is written in disjunctive language, and we have defined "heinous" as "extremely wicked or shockingly evil"; "pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others." *Eddings v. State*, 616 P.2d 1159 (Okl.Cr. 1980), remanded for resentencing 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel, (see *Stafford v. State*, 665 P.2d 1205

(Okl.Cr.1983), wherein the defendant marched six persons into a meat locker and opened fire, amidst the screams for help; and *Jones v. State,* 648 P.2d 1251 (Okl.Cr.1982), wherein the defendant shot his victim at point blank range, and mocked him as he bled to death), it is not a necessary one. In *Eddings v. State,* 616 P.2d 1159 (Okl.Cr.1980), this Court held that the fact that the victim was a police officer rendered the crime especially heinous, atrocious or cruel under the above definitions.

This Court held in *Boutwell v. State,* 659 P.2d 322 (Okl.Cr.1983), that the murder of a convenience store clerk was "especially heinous, atrocious or cruel," because the defendant, who knew the victim, planned the murder well in advance. In *Davis v. State,* 665 P.2d 1186 (Okl.Cr. 1983), this Court held that the defendant's act of shooting his victims several times was "atrocious." In *Jones,* supra, we held that the defendant's acts of shooting three persons in a barroom for no apparent reason was "extremely wicked" and "shockingly evil." In *Chaney v. State,* 612 P.2d 269 (Okl.Cr.1980), we held that the manner in which the victims were killed, coupled with the demands for ransom and the manner in which the bodies were disposed of justified the imposition of the death sentence, when one of the aggravating circumstances found was that the murder was especially heinous, atrocious or cruel.

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gage whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles;

that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in *Nuckols v. State,* 690 P.2d 463, 55 O.B.A.J. 2259 (Okl.Cr.1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Likewise, it is apparent from these facts that the appellant's murderous escapade created a great risk of death to more than one person. Evidence at trial, which was subsequently incorporated by reference into the punishment stage, established that when Charma arrived at the hospital, her blood pressure was almost nonexistent and that she would have died had she arrived any later. The fact that the two victims were not together in the same room when the appellant shot them is immaterial, in light

of the close proximity of the victims, and rapid and fluid nature of the appellant's attack.[5]

Thirdly, we hold the sentence of death in this case not to be excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[6] See *Stout v. State*, 693 P.2d 617 (Okl.Cr. 1984), wherein defendant broke into his sister's and brother-in-law's home and beat their brains out; *Nuckols v. State*, supra, wherein defendant stopped to help a motorist, drank a beer with him, visited with him, and then with co-defendant attacked victim with a ball peen hammer, hitting and kicking victim to death; *Stafford v. State*, 669 P.2d 285 (Okl.Cr.1983) vacated and remanded on other

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5. The appellant argues in his seventh assignment of error that the trial court's failure to provide any definition for the "knowingly created a great risk of death to more than one person" aggravating circumstance unconstitutionally afforded the jury uncontrolled discretion, within the meaning of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

This argument has been raised for the first time on appeal. It is therefore not properly before us. *McDuffie v. State*, 651 P.2d 1055 (Okl.Cr.1982). Moreover, as the State asserts, there was no reason to request such an instruction. The constitutionality of the statute has been upheld against arguments that it is overly broad. *See, Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

6. The appellant's fifth assignment of error is that this Court has been evaluating the heinous, atrocious or cruel aggravating circumstances (21 O.S.1981, § 701.12(4)) in an arbitrary manner. We have considered the argument to the extent that it applies to our consideration of whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S.1981, § 701.13(C)(3). Beyond this, the appellant has no standing to complain of decisions reached in other cases.

grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984), wherein the defendant emerged from hiding and shot a family when they stopped along the roadside to help a person they believed to be in distress; *Coleman v. State*, supra, wherein the defendant murdered a man and woman who walked in on him as he was burglarizing their residence; *Davis v. State*, 665 P.2d 1186 (Okl.Cr.1983), cert. denied, — U.S. —, 104 S.Ct. 203, 78 L.Ed.2d 177, wherein, after a prior altercation, the defendant shot and killed two persons as they were moving his estranged wife's property from his apartment; *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983), wherein the defendant and his accomplice gained entry into their victims' home, tied them up, and shot the four of them, killing two; and *Hays v. State*, 617 P.2d 223 (Okl.Cr.1982), wherein the defendant assaulted some motorists with a pistol after having robbed and killed a store owner. We also find that the appellant's conduct was much more egregious than that of the defendant in *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982), wherein the defendant approached the pickup in which the victim was riding and, from the outside, fired one shot through his neck, and left the scene.[7]

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7. We have also compared this case with the following cases and found the sentence of death herein is not excessive or disproportionate: *Robison v. State*, 677 P.2d 1080 (Okl.Cr. 1984), cert. denied, — U.S. —, 104 S.Ct. 3524, 82 L.Ed.2d 831; *Stafford v. State*, 665 P.2d 1205 (Okl.Cr.1983), vacated and remanded on other grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984); *Parks v. State*, 651 P.2d 686 (Okl.Cr. 1982), cert. denied, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1983) cert. denied, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002; and, *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), cert. denied, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

In view of the above, we hold that the appellant's eighth assignment of error, that modification is mandated if one of the two aggravating circumstances falls, must be dismissed.

The judgments and sentences are AFFIRMED.

BRETT, J., concurs.

PARKS, J., concurs in results.

William Thomas CARTWRIGHT, Petitioner-Appellant,

v.

Gary D. MAYNARD, Warden, Oklahoma State Penitentiary at McAlester, Oklahoma, and Robert Henry, successor to Michael C. Turpen, Attorney General of Oklahoma, Respondents-Appellees.

No. 86-1231.

United States Court of Appeals, Tenth Circuit.

June 22, 1987.

Before HOLLOWAY, Chief Judge, and BARRETT, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK, Circuit Judges.

ON REHEARING EN BANC

TACHA, Circuit Judge.

Petitioner William Thomas Cartwright appeals from the denial of habeas corpus relief by the United States District Court for the Eastern District of Oklahoma. Cartwright was convicted of the murder of Hugh Riddle and sentenced to death following a determination that the murder satisfied two statutory aggravating circumstances and that these aggravating circumstances outweighed the mitigating evidence. Cartwright alleges that the state of Oklahoma applied the "especially heinous, atrocious, or cruel" aggravating circumstance in a unconstitutionally vague and overbroad manner in this case. We agree.

Cartwright was tried and convicted of first degree murder for the shooting of Hugh Riddle.[1] The state ar-

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1. Cartwright was also convicted of shooting Charma Riddle with intent to kill. He was sentenced to seventy-five years imprisonment for that crime.

gued that three of the aggravating circumstances enumerated under Oklahoma law justified the imposition of the death penalty: first, the defendant knowingly created a great risk of death to more than one person; second, the murder was "especially heinous, atrocious, or cruel;" and third, the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See* Okla.Stat.Ann. tit. 21, §§ 701.12(2), (4), (7) (West 1983). The jury concluded that the first two aggravating circumstances were established, but that the evidence did not support the third aggravating circumstance. The jury then weighed the aggravating circumstances and the mitigating circumstances and sentenced Cartwright to death for the murder of Hugh Riddle.

The Oklahoma Court of Criminal Appeals affirmed the convictions and the sentences on appeal. *Cartwright v. State*, 695 P.2d 548 (Okla.Crim.App.), *cert. denied*, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985) The state courts then denied Cartwright's application for post-conviction relief. *Cartwright v. State*, 708 P.2d 592 (Okla. Crim.App.1985), *cert. denied*, — U.S. —, 106 S.Ct. 837, 88 L.Ed.2d 808 (1986). The United States District Court for the Eastern District of Oklahoma denied Cartwright's petition for a writ of habeas corpus. A panel of this court affirmed the denial of the petition. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir.1986). We granted rehearing *en banc* on the question of the application of the "especially heinous, atrocious, or cruel" aggravating circumstance.[2]

There are three questions presented in this appeal. First, we must decide whether reliance upon an unconstitutionally vague or overbroad statutory aggravating circumstance required the reversal of a death sentence where the sentencer was required to balance the aggravating circumstances with the mitigating circumstances. Second, if such reliance requires that the death sentence be vacated, we must then decide whether the Oklahoma courts in this case applied a constitutionally adequate narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case. Finally, if the state courts failed to apply a proper narrowing construction, we must decide whether this court can apply a narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case.

For the reasons stated in this opinion, we conclude that: (1) reliance upon a constitutionally invalid aggravating circumstance requires that the death sentence be vacated; (2) the Oklahoma courts failed to apply a constitutionally adequate narrowing construction in this case; and (3) this court cannot decide what narrowing construction is to be applied by the state of Oklahoma. We there-

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2. The previous panel decision disposed of all six of Cartwright's suggested grounds for habeas relief. *See Cartwright v. Maynard*, 802 F.2d at 1209-22. We do not disturb the decision of the panel regarding five of those issues. We only consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was vague and overbroad in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

fore remand to the district court with directions to enter judgment in accord with this opinion.

I.

Cartwright was sentenced to death after two statutory aggravating circumstances were established. If Cartwright's death sentence can rest on the unchallenged aggravating circumstance of creating a great risk of death to more than one person, we need not reach the constitutional challenge to the "especially heinous, atrocious, or cruel" aggravating circumstance. *See, e.g. Superintendent, Massachusetts Correctional Inst. v. Hill*, 472 U.S. 445, 450, 105 S.Ct. 2768, 2771, 86 L.Ed.2d 356 (1985) (a federal court will address a constitutional question only when it is necessary to the resolution of the case before the court). Thus, we must first decide whether the unchallenged aggravating circumstance supports the death sentence even if the challenged aggravating circumstance were found to be invalid.

The validity of a death sentence based in part on consideration of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Zant v. Stephens*, 462 U.S. 862, 864, 103 S.Ct. 2733, 2736, 77 L.Ed. 2d 235 (1983); *see also Barclay v. Florida*, 463 U.S. 939, 951, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); *accord Andrews v. Shulsen*, 802 F.2d 1256, 1263 (10th Cir.1986). The Supreme Court has addressed this question under Georgia law in *Zant* and under Florida law in *Barclay* and *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1984). We are presented with the same question under the law of Oklahoma.

Under the Georgia statute reviewed in *Zant*, first degree murder is not necessarily a capital offense. The death penalty can be imposed for first degree murder only if at least one statutory aggravating circumstance is established. A statutory aggravating circumstance is used simply to cross the threshold dividing first degree murders that are not eligible for the death penalty and first degree murders that are eligible for the death penalty. It does not matter how many statutory aggravating circumstances are present—only one is needed to cross the threshold. Therefore, as long as one valid aggravating circumstance remains, the murder is a capital offense even if other aggravating circumstances are subsequently found invalid.

Moreover, an aggravating circumstance under the Georgia statute is used only to determine which first degree murders are capital offenses. An aggravating circumstance does not play the additional role of guiding the sentencer in the exercise of its statutory discretion in deciding whether to sentence a particular murderer to life imprisonment or to death. No particular aggravating circumstance is afforded special weight. There is no requirement that aggravating circumstances be balanced against mitigating circumstances. *See Zant*, 462 U.S. at 873-74, 103 S.Ct. at 2740-41.

The *Zant* Court held that two valid aggravating circumstances served the constitutionally required function of narrowing the class of persons eligible for the death

penalty even though a third aggravating circumstance—that the defendant had "a substantial history of serious assaultive criminal convictions"—had been held unconstitutionally vague. *Id.* at 878-79, 103 S.Ct. at 2743-44. Once the class of persons eligible for the death penalty has been determined, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." *Id.* at 878, 103 S.Ct. at 2743 (footnote omitted). The Court then held that the evidence of the defendant's prior criminal record, while not a valid statutory aggravating circumstance, could be considered by the sentencer in selecting the proper punishment. Thus, although the defendant's prior criminal record was improperly considered as a statutory aggravating circumstance, the Court allowed the jury to consider such evidence in deciding whether to impose the death penalty. Labeling the evidence of a prior criminal record as a statutory aggravating circumstance "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given," but that possibility did not rise to the level of constitutional error. *Id.* at 888-89, 103 S.Ct. at 2749.

The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*. An aggravating circumstance under the Oklahoma scheme does not establish a threshold that distinguishes capital murders from other first degree murders. In Oklahoma *any* first degree murder is punishable by life imprisonment or death. Okla.Stat.Ann. tit. 21, § 701.9 (West 1983). Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty. *See Zant*, 462 U.S. at 875, 103 S.Ct. at 2741 (Georgia), *Andrews*, 802 F.2d at 1263 (Utah); *Welcome v. Blackburn*, 793 F.2d 672, 677 (5th Cir.1986) (Louisiana). *Cf. Johnson v. Thigpen*, 806 F.2d 1243, 1248 (5th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987) (Mississippi).

Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla.Stat.Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat.Ann. tit. 21, § 701.11 (West 1983). *Zant* does not determine the effect of consideration of an unconstitutional statutory aggravating circumstance under the Oklahoma statute, for the Court in *Zant* carefully observed that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U.S. at 890, 103 S.Ct. at 2750; *see also id.* at 873-74 n. 12, 103 S.Ct. at 2741 n. 12.

Florida, like Oklahoma, uses an aggravating circumstance to guide the discretion of the sentencer rather than

to define which first degree murders are capital offenses. In this respect the Oklahoma statute is similar to the Florida statute reviewed by the Supreme Court in *Barclay* and *Goode*. Nevertheless, this case differs from *Barclay* and *Goode* in two important respects. First, the Oklahoma courts do not reweigh the aggravating and mitigating circumstances after an aggravating circumstance has been found invalid. Second, this case involves an allegation that an aggravating circumstance is invalid under the federal constitution rather than state law.

In *Barclay*, the trial judge found several aggravating circumstances but no mitigating circumstances and sentenced the defendant to death. The State conceded before the Supreme Court that one of the aggravating circumstances relied upon by the state courts—Barclay's criminal record—was not a statutory aggravating circumstance under state law. *Barclay*, 463 U.S. at 946, 103 S.Ct. at 3422. In cases where no mitigating circumstances were found, the Florida courts had held that the effect of a sentencer's erroneous consideration of an improper aggravating circumstance would be determined by a harmless error analysis. *Elledge v. State*, 346 So.2d 998, 1002-03 (Fla. 1977), *cited in Barclay*, 463 U.S. at 955, 966 n. 12, 103 S.Ct. at 3427 n. 12.

The Supreme Court held that this procedure satisfied the constitutional demand of "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, 463 U.S. at 958, 103 S.Ct. at 3429 (plurality opinion of Rehnquist, J., with Burger, C.J., & White & O'Connor, JJ.); *id.* at 967, 103 S.Ct. at 3433 (Stevens, J., with Powell, J., concurring

in the judgment) (quoting *Zant*, 462 U.S. at 879, 103 S.Ct. at 2744) (emphasis original). Justice Rehnquist wrote that because the aggravating circumstance was invalid only under *state* law,

> [T]his case is distinguishable from *Zant v. Stephens* . . . where one of the three aggravating circumstances found in Georgia state court was found to be invalid under the Federal Constitution. Of course, a " 'mere error of state law' is not a denial of due process." Thus we need not apply the type of federal harmless-error analysis that was necessary in *Zant*. . . .

Id. at 951 n. 8, 103 S.Ct. at 3425 n. 8 (citations omitted). The plurality then noted that while state law prohibited a sentencer from considering nonstatutory aggravating circumstances, *id.* at 954, 103 S.Ct. at 3427, "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record." *Id.* at 956, 103 S.Ct. at 3428; *see also id. at* 966-67, 103 S.Ct. at 3433-34 (Stevens, J., concurring in the judgment). The plurality concluded that consideration of an aggravating circumstance invalid under state law did not render the balancing unconstitutional because "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Id.* at 958, 103 S.Ct. at 3429. Justice Stevens agreed that one valid aggravating circumstance could constitutionally support a death sentence on appeal if no statutory mitigating circumstances had been found. *Id.* at 967-68, 103 S.Ct. at 3433-34.

In *Goode*, the Supreme Court again considered the application of the Florida statute. One aggravating cir-

has held that if an aggravating circumstance used in the balancing by the sentencer is found invalid on appeal, the death penalty must be modified to life imprisonment. *Id.* The Oklahoma courts have refused to apply a harmless error analysis or to independently reweigh the aggravating and mitigating circumstances. Thus, Oklahoma has no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance.

The Arkansas courts have also concluded that they "are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three." *Williams v. State*, 274 Ark. 9, 12, 621 S.W.2d 686, 687 (Ark.1981), *cert. denied*, 459 U.S. 1042, 103 S.Ct. 460, 74 L.Ed.2d 611 (1982), *quoted in Collins v. Lockhart*, 754 F.2d 258, 267 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). In *Collins*, the Eighth Circuit held that one of the aggra-

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vating circumstances is found to be unconstitutionally vague or overbroad. *Zant* and *Barclay* noted that the state appeals courts in those cases had performed a proportionality review. *Zant*, 462 U.S. at 879-80, 103 S.Ct. at 2743-44; *Barclay*, 463 U.S. at 958, 972-74, 103 S.Ct. at 3436-37. Neither decision, however, suggested that a proportionality review could serve as an independent basis for upholding a death sentence imposed after reliance upon an unconstitutional aggravating circumstance. *Zant* emphasized the special role of an aggravating circumstance in *Georgia*. 462 U.S. at 879, 103 S.Ct. at 2743. *Barclay* emphasized that the Florida Supreme Court had considered only the valid aggravating circumstances in rebalancing on appeal. *Barclay*, 463 U.S. at 958, 103 S.Ct. at 3429. Moreover, since *Zant* and *Barclay* it has been established that a proportionality review is not constitutionally required. *Pulley* v. *Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). We conclude that the proportionality review in this case would not save the death penalty because reliance upon the allegedly unconstitutional aggravating circumstances was not cured on appeal.

cumstance had been found invalid under state law in *Goode*, as in *Barclay*, but mitigating circumstances were present in *Goode*, unlike *Barclay*. The Florida Supreme Court had indicated that it would perform a harmless error analysis only if there were no mitigating circumstances. *See Barclay*, 463 U.S. at 954-55, 103 S.Ct. at 3427. In *Goode*, on the other hand, the Florida Supreme Court independently rebalanced the valid aggravating circumstances with the mitigating circumstances. The United States Supreme Court recognized that "there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." *Goode*, 464 U.S. at 86-87, 104 S.Ct. at 383. Thus, the death sentence was constitutionally permissible.

Two of the elements relied upon in *Barclay* and *Goode* are absent in this case. First, unlike the Florida courts, the Oklahoma courts have been "unwilling to speculate as to the effect the improper aggravating circumstance . . . had on the jury's recommendation to impose the death penalty." *Johnson v. State*, 665 P.2d 815, 827 (Okla.Crim. App.1983).[3] The Oklahoma Court of Criminal Appeals

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3. At the time that Cartwright was sentenced, the Oklahoma Court of Criminal Appeals had a statutory obligation to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Okla.Stat.Ann. tit. 21, § 701.13(C)(3) (West 1983). The court held that Cartwright's death sentence was not "excessive or disproportionate to the penalty imposed in similar cases." *Cartwright v. State*, 695 P.2d at 555.

The state asserts that this "proportionality review" would save the death sentence in this case even if one of the aggra-

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vating circumstances relied upon by the Arkansas courts in imposing a death sentence was unconstitutional. The court then considered the effect of this holding in light of the presence of other valid aggravating circumstances. After examining the statutes at issue in *Zant* and *Barclay*, the court concluded:

> In Arkansas, the practice is decisively different. Here, unlike Georgia, weighing does take place. . . . Furthermore, unlike the practice in Florida, if an aggravating circumstance is held invalid for any reason, the Supreme Court of Arkansas does not engage in any sort of harmless-error analysis. The death penalty is automatically reduced to life imprisonment, unless the state chooses to retry the question of punishment to a second jury.

Collins, 754 F.2d at 267. The court then held that "[t]he reasoning underlying [*Zant v.*] *Stephens* and *Barclay* is therefore inapplicable here, and the presence of an invalid aggravating circumstance means that the sentence of death cannot stand." *Id.*

The second difference between this case and *Barclay* and *Goode* lies in the reason that an aggravating circumstance is invalid. The plurality in *Barclay* emphasized that the particular aggravating circumstance at issue was invalid under state law. *Barclay*, 463 U.S. at 951 n. 8, 103 S.Ct. at 3425 n. 8. *See also Goode*, 464 U.S. at 86, 104 S.Ct. at 383. Cartwright alleges that the "especially heinous, atrocious, or cruel" aggravating circumstance violates the federal constitution. We agree that "*Zant* and *Barclay* leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L.Rev. 1129, 1181 (1984).

The Supreme Court's decisions show that the particular function of an aggravating circumstance in a state's capital punishment system determines the effect of reliance upon an unconstitutional aggravating circumstance. An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant. Further, the Oklahoma courts have declined to reconsider that decision on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process.[4] In such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the bal-

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4. The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. *Cartwright v. State*, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla.Stat.Ann. tit. 21, § 701.13(E)(2) (West Supp.1986). The Oklahoma court has held that this provision is not to be applied retroactively. *Green v. State*, 713 P.2d 1032, 1041 n. 4 (Okla.Crim.App. 1985), *cert. denied*, — U.S. —, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986). *But see Brewer v. State*, 718 P.2d 354, 365-66 (Okla. Crim.App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), *cert. denied*, — U.S. —, 107 S.Ct. 245, 93 L.Ed. 2d 169 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in *Collins*, 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

ance struck by the sentencer. The improper reliance is not corrected by the state appellate review process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

II.

Death is qualitatively different from other punishments that can be imposed by the state. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 2603, 91 L.Ed.2d 335 (1986); *California v. Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 3451-52, 77 L.Ed.2d 1171 (1983). This difference necessitates heightened scrutiny to assure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishments. In a constitutional scheme borne of concern for restraining the effect of governmental action on personal life and liberty, the death sentence is the ultimate restraint. We are thus further charged with heightened responsibility for assuring that that restraint is exercised in strict conformity with the requirements of the Constitution. The Supreme Court has consistently demanded that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, — U.S. —, 107 S.Ct. 837,

839, 93 L.Ed.2d 934 (1987). The Constitution requires us to engraft objective standards on a sentencing decision so vulnerable to subjective judgments. The difficulty of the task is reflected in the words of Justice Harlan:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

McGautha v. California, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).

We must scrutinize the Oklahoma statutory scheme to determine whether the state has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide adequate justification for imposing the death penalty. The question before this court is whether the application of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance satisfied the requirements of the Constitution in this case. We begin our consideration by examining the constitutional requirement that the discretion of a sentencer in a capital case be carefully guided.

A.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court effectively invalidated the capital punishment statutes of the thirty-nine states that provided absolute discretion to the sentencer in choosing the appropriate penalty in a capital case. The Court held that "the imposition and carrying out of the

death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40, 92 S.Ct. at 2727. Three justices concluded that a procedure for imposing the death penalty cannot allow complete and unguided discretion to the sentencer in deciding whether a particular defendant should be sentenced to death or life imprisonment. *Id.* at 255-57, 92 S.Ct. at 2734-35 (Douglas, J., concurring); *id.* at 309-10, 92 S.Ct. at 2762-63 (Stewart, J., concurring); *id.* at 314, 92 S.Ct. at 2764 (White, J., concurring). The existing procedures for the imposition of capital punishment provided "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313, 92 S.Ct. at 2764 (White, J., concurring).

Thirty-five states quickly enacted new statutes in an attempt to meet the constitutional demands. These statutes followed two different approaches. Some states sought to eliminate the arbitrary infliction of the death penalty by making the death penalty mandatory for all defendants convicted of first degree murder. Other states sought to channel the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances, and appellate review of each death sentence.

The Supreme Court decided challenges to death sentences imposed under five of these statutes on July 2, 1976. The Court held that the death penalty is not cruel and unusual punishment per se. *Gregg v. Georgia*, 428 U.S. 153, 168-87, 96 S.Ct. 2909, 2922-31, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 226, 96

S.Ct. at 2949 (White, J., concurring in the judgment) (citing *Roberts v. Louisiana*, 428 U.S. 325, 350-56, 96 S.Ct. 3001, 3013-16, 49 L.Ed.2d 974 (1976) (White, J., with Burger, C.J., Blackmun and Rehnquist, JJ., dissenting)). The Court further found that the Georgia "guided discretion" statute satisfied the *Furman* mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.). The statute also "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Id.* at 206, 96 S.Ct. at 2940. *See also Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (upholding the constitutionality of the Florida guided discretion statute); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (upholding the constitutionality of the Texas guided discretion statute). In contrast, the Court in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. at 325, 96 S.Ct. at 3002, held that the mandatory death penalty statutes of North Carolina and Louisiana were invalid because they failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," and "simply papered over the problem of unguided and unchecked jury discretion." *Woodson*, 428 U.S. at 302-03, 96 S.Ct. at 2990 (opinion of Stewart, Powell, and Stevens, JJ.).

As the Supreme Court recently explained:

> [O]ur decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, *the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.* Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey v. Kemp, — U.S. —, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987) (emphasis added).

B.

An aggravating circumstance performs a crucial function in a capital punishment statute that endeavors to channel the discretion of the sentencer. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984). An aggravating circumstance is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the death penalty. In essence, an aggravating circumstance is a legislative determination that "this murder is different." This difference "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742 (footnote omitted). A statutorily designated aggravating circumstance accomplishes this by "identify[ing] special indicia of blameworthiness or dangerousness in the killing." Weisberg, *Deregulating Death*, 1983 Sup.Ct.Rev. 305, 329 (1983). Thus, "the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934 (opinion of Stewart, Powell, and Stevens, JJ.).

The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. Many aggravating circumstances require distinctions among murders that are relatively easy for a sentencer to make: more than one person was killed by the acts of the defendant, Ky.Rev.Stat. § 532.025(2)(a)(6) (Michie/Bobbs-Merrill Supp. 1986); the victim was pregnant, Del. Code. Ann. tit. 11, § 4209(e)(1)(p) (Supp.1986); or the murder was committed by a hidden explosive device. Cal. Penal Code § 190.2(a)(4) (West Supp.1987).

The Supreme Court has warned, however, that a standard could be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742 (quoting *Gregg*, 428 U.S. at 195 n. 46, 96 S.Ct. at 2935 n. 46). Thus, if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L.Rev. 941, 954 (1986)[hereinafter *The Standardless Standard*] (footnote omitted).

C.

The Oklahoma capital punishment statute includes as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel." Okl.Stat.Ann. tit. 21, § 701.12(4) (West 1983). Twenty-three other states have a similar aggravating circumstance, using such terms as "outrageously or wantonly vile," "heinous," "horrible," "brutal," "depraved," "cruel," "inhuman," and "atrocious" to describe a particularly offensive crime. *See* Rosen, *The Standardless Standard*, 64 N.C.L.Rev. at 943 n. 7. Although the Supreme Court has not held such language to be facially unconstitutional, the Court has "not stopped at the face of a statute, but [has] probed the application of statutes to particular cases." *McCleskey*,

107 S.Ct. at 1773. A state court interpretation of the statutory language of an aggravating circumstance can be "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion." *Id.*

Cartwright alleges that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was applied in an unconstitutionally vague and overbroad manner in this case. In deciding this claim, we first review the Supreme Court decisions involving challenges to statutory provisions similar to the "especially heinous, atrocious, or cruel" aggravating circumstance at issue in this case. We then turn to the evolution of the meaning of "especially heinous, atrocious, or cruel" as construed by the Oklahoma Court of Criminal Appeals. Finally, we determine whether that court's application of the aggravating circumstance in this case satisfies the demands of the United States Constitution.

The Supreme Court first considered challenges to this type of aggravating circumstance in *Gregg* and *Proffitt*. Although the murder in *Gregg* had not been found to satisfy the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated ba ery to the victim," *see* Ga.Code Ann. § 17-10-30 (b)(7) (1982), the petitioner asserted that the alleged vagueness of that provision rendered the entire Georgia statutory sentencing procedure unconstitutional. The Supreme Court disagreed, recognizing that it is "arguable that any murder involves depravity of mind or an aggravated battery," but concluding that "this language need

not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Gregg*, 428 U.S. at 201, 96 S.Ct. at 2938 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted). In *Proffitt*, the trial judge found that the murder was "especially heinous, atrocious, or cruel." *See* Fla.Stat.Ann. § 921.141(5)(h) (West 1985). The Florida courts had construed that provision to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The Supreme Court held that by so limiting the statutory description, the state provided adequate guidance to the sentencer. *Proffitt*, 428 U.S. at 255-56, 96 S.Ct. at 2968.

The Supreme Court reviewed the Georgia courts' application of the aggravating circumstance in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Justice Stewart observed:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Id. at 428, 100 S.Ct. at 1764 (plurality opinion of Stewart, J., with Blackmun, Powell, and Stevens, JJ.) (footnote and citations omitted). *See also id.* at 433, 100 S.Ct. at 1767 (Marshall, J., with Brennan, J., concurring in the judgment) (reiterating their belief that "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.") The jury had found only that the offense was "outrageously or wantonly vile, horrible and inhuman." *Id.* at 428, 100 S.Ct. at 1765 (footnote omitted). Because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence . . . the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation." *Id.* at 428-29, 100 S.Ct. at 1765.

The plurality also found that the jury's uncontrolled discretion was not cured on appeal in the state courts. While in cases preceding *Godfrey* the Georgia Supreme Court had applied a narrowing construction of the statutory provision, in *Godfrey* the state court "simply asserted that the verdict was 'factually substantiated.'" *Id.* at 432, 100 S.Ct. at 1767. Therefore, the plurality considered "whether, in light of the facts and circumstances of the murders . . . the Georgia Supreme Court can be said to have applied a constitutional construction" of the statutory phrase. *Id.* The plurality concluded that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433, 100 S.Ct. at 1767. Accordingly, the Court reversed the sentence of death.

The Oklahoma Court of Criminal Appeals has reviewed almost thirty cases in which the death penalty was imposed after the jury concluded that a murder was "especially heinous, atrocious, or cruel." The court originally held that this aggravating circumstance must be applied according to the narrowing construction approved

in *Proffitt*, but Oklahoma has since abandoned that construction.

In *Eddings v. State*, 616 P.2d 1159 (Okla.Crim.App. 1980), *rev'd on other grounds sub nom. Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Oklahoma Court of Criminal Appeals considered the "especially heinous, atrocious, or cruel" provision for the first time. The court recognized that "[t]he aggravating circumstance in the statute is for murders that are *especially* heinous, atrocious and cruel, and obviously the Legislature must have intended to reach killings which are 'out of the ordinary.'" *Id.* at 1167 (emphasis original). The court then quoted the following passage from the narrowing construction of the Florida court that the Supreme Court had approved in *Proffitt:*

> "[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Eddings, 616 P.2d at 1167-68 (quoting *Dixon*, 283 So.2d at 9). The court concluded that the killing of a police officer in the performance of his duties satisfied this standard,[5] and that the testimony at trial regarding the defendant's manner indicated that the killing was "'designed to inflict a high degree of pain with utter indifference to . . . the suffering of others.'" *Eddings*, 616 P.2d at 1168 (quoting *Dixon*, 283 So.2d at 9).

Since *Eddings*, the Oklahoma court has consistently followed that part of the narrowing construction approved in *Proffitt* providing that "'heinous' means 'extremely wicked or shockingly evil'; 'atrocious' means 'outrageously wicked and vile'; and 'cruel' imports a design to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.'" *Brogie v. State*, 695 P.2d 538, 542 (Okla.Crim.App.1985) (quoting *Stafford v. State*, 665 P.2d 1205, 1217 (Okla.Crim.App. 1983), *vacated on other grounds*, 467 U.S. 1212, 104 S.Ct. 2651, 81 L.Ed.2d 359 (1984)). The court has frequently approved jury instructions using this language. *See, e.g., Davis v. State*, 665 P.2d 1186, 1202 (Okla.Crim.App.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *Burrows v. State*, 640 P.2d 533, 542 (Okla.Crim.App1982), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983); *Chaney v. State*, 612 P.2d 269, 280 (Okla.Crim.

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5. The United States Supreme Court vacated the death sentence in *Eddings* because the state court had failed to consider evidence of the defendant's unhappy upbringing and emotional disturbance as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113-17, 102 S.Ct. 869, 876-78, 71 L.Ed.2d 1 (1982). The Court also noted in dicta that the state court had held that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel." In response, the Court said, "we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey*." *Id.* at 109 n. 4, 102 S.Ct. at 874 n. 4.

App.1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

The court has also quoted the passage in *Eddings*—originally approved in *Proffitt*—that limits this aggravating circumstance to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Nuckolls v. State*, 690 P.2d 463, 471-73 (Okla.Crim.App.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Boutwell v. State*, 659 P.2d 322, 329 (Okla.Crim. App.1983); *Burrows*, 640 P.2d at 542.[6] The Oklahoma Court of Criminal Appeals has never held that this language is mandatory, however, thus rejecting part of the narrowing construction approved in *Proffitt* and seemingly adopted in *Eddings*. In *Irvin v. State*, 617 P.2d 588, 598-99 (Okla.Crim.App.1980), the court held that it was not mandatory to include the "unnecessarily torturous to the victim" language in the instructions to the jury. Three years later, in *Davis*, 665 P.2d at 1202-03, the court rejected the argument that a subtantial amount of torture

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6. The uniform jury instruction which defines "heinous, atrocious, or cruel" provides:

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Okla. Uniform Jury Instruction Cr. No. 436. This instruction has been used on occasion. *See, e.g., State v. Liles*, No. CRF-82-4268 (Okla. County Dist. Ct. May 18, 1983) (Instruction No. 3), *aff'd*, 702 P.2d 1025 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986), *quoted in* Supplement to Record, Mar. 3, 1987, at 4.

must precede the killing for a murder to be "especially heinous, atrocious, and cruel." Then, in *Nuckolls*, the court held:

> [Our] cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. . . . [T]he "manner of the killing" is a relevant consideration, as well as the circumstances surrounding the homicide. We also have examined the killer's attitude to learn if it was especially pitiless or cold.

690 P.2d at 472 (citations omitted). The court concluded that "both the circumstances leading up to, and the manner in which the homicide was committed, [are] sufficiently atrocious to be at the 'core' of the circumstance." *Id.* at 472-73.

The Oklahoma Court of Criminal Appeals then decided Cartwright's appeal in this case. The jury at Cartwright's trial had been instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." On appeal the court noted that the statute is written in disjunctive language—the murder must be especially heinous, atrocious, *or* cruel—so a murder need only fall within one of these terms as defined by the court. *Cartwright v. State*, 695 P.2d at 554. The court then held that while torture is sufficient to satisfy this aggravating circumstance, it is not necessary. *Id.* The court described some of the factors that had supported this aggravating circumstance in previous cases: the defendant knew the victim and planned the murder well in advance, *Boutwell*,

659 P.2d at 329; the defendant shot his victims several times, *Davis*, 665 P.2d at 1202-03; the defendant shot three persons in a barroom for no apparent reason, *Jones v. State*, 648 P.2d 1251, 1259 (Okla.Crim.App.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983); and the defendant kidnapped two women, demanded $500,000 in ransom, and murdered and buried the women. *Chaney*, 612 P.2d at 280, 282. The court wrote:

> Therefore, we decline to consider this murder as though it occurred in a vacuum. *We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder*, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder, that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; then he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in *Nuckols v. State*, 690 P.2d 463, 55 O.B.A.J. 2259 (Okl.Cr.1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Cartwright v. State, 695 P.2d at 554 (emphasis added).

The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in *Eddings*. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in *Eddings* and previously approved by the Supreme Court in *Proffitt*. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1764 (footnotes omitted).

Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement that the offense was "outrageously wicked and vile, horrible and inhuman" was inadequate in *Godfrey*: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder.

These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood, interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

The definition of "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" is somewhat more precise, but there are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance. *See Nuckols*, 690 P.2d at 472; *see also Green v. State*, 713 P.2d 1032, 1044 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986). Second, because the Oklahoma court has emphasized that a murder need only be especially heinous, atrocious, or cruel, *See Cartwright v. State*, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance. The court no longer limits the application of the "especially heinous, atrocious, or cruel" aggravating circumstance to those crimes that are "unnecessarily torturous to the victim." *See id.*

According to the state, the terms "heinous," "atrocious," and "cruel," coupled with their definitions, direct

the attention of the sentencer to the manner of the killing and the attitude of the killer. Transcript of oral argument at 19. The Oklahoma court has said that the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are relevant considerations in determining whether a murder was "especially heinous, atrocious, or cruel." *See Nichols*, 690 P.2d at 472; *see also Liles v. State*, 702 P.2d 1025, 1032 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986). We examine each factor in turn.

In several cases the Oklahoma court has cited the killer's "conscienceless" or "pitiless" attitude or indifference to the suffering of the victim in supporting a finding that a murder was "especially heinous, atrocious or cruel." *See, e.g., Green*, 713 P.2d at 1044-45; *Cooks v. State*, 699 P.2d 653, 661 (Okla.Crim.App.), *cert. denied*, 474 U.S. 935, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *Boutwell*, 659 P.2d at 329; *Jones*, 648 P.2d at 1259. But as the court has recognized, the attitude of the killer is best evidenced by what the killer has done. *See Green*, 713 P.2d at 1044-45. *See also Nuckols*, 690 P.2d at 473 ("the circumstances of this killing, coupled with appellant's comments . . . reveal this crime was shockingly pitiless"). Thus, the inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense.

"[T]he manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." *Chaney*, 612 P.2d at 280. The unanswered question, however, is what manner of killing makes a murder

"especially heinous, atrocious, or cruel." The Oklahoma court has never explained why one manner of killing is "especially heinous, atrocious, or cruel" and why another manner of killing is not. The cases in which the court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed. *See, e.g., Green,* 713 P.2d at 1035 (defendant stabbed an inmate seventeen times in the chest and the back with a butcher knife and slashed in the throat); *Cooks,* 699 P.2d at 656 (defendant raped, beat, and suffocated an 87-year-old disabled woman); *Nuckols,* 690 P.2d at 465, 472-73 (defendant struck the victim with a ball peen hammer and kicked him repeatedly); *Jones,* 648 P.2d at 1253-54 (defendant repeatedly shot three persons in a bar). *But see Odum v. State,* 651 P.2d 703, 707 (Okla.Crim.App.1982) ("the manner of killing cannot be said to lie at the 'core' of the statutory aggravating circumstance" where the defendant shot the victim once in the neck and rendered him unconscious immediately). Further, the Oklahoma court has held a torture murder is not the only kind that is "especially heinous, atrocious, or cruel." *See Cartwright v. State,* 695 P.2d at 554. The court has not identified which manners of killing are *not* "especially heinous, atrocious, or cruel." Therefore, the court's reliance upon the manner of the killing does not serve to distinguish among those murders that are punishable by death and those that are not.

The suffering of the victim has been relied upon in several instances in which this aggravating circumstance was found. *See, e.g., Liles,* 702 P.2d at 1032; *Stafford,* 665 P.2d at 1217; *Burrows,* 640 P.2d at 543. On one occasion, the absence of any suffering by the victim led the state appeals court to reverse a finding that a murder was "especially heinous, atrocious, or cruel." *Odum,* 651 P.2d at 707. Nonetheless, the court has held that it is not necessary for the victim to have suffered for a murder to satisfy this aggravating circumstance. *See Nuckols,* 690 P.2d at 472. Suffering is sufficient but not required.

The Oklahoma Court of Criminal Appeals, then, has said that the attitude of the killer, the manner of the killing, or the suffering of the victim *can* support this aggravating circumstance, but the court has refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance. The underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was "especially heinous, atrocious, or cruel." *See Cartwright v. State,* 695 P.2d at 554; *see also Nuckols,* 690 P.2d at 472, *quoted in Green,* 713 P.2d at 1044. In numerous cases the court has affirmed a finding that a murder was "especially heinous, atrocious, or cruel" with no more than a statement that "the facts adequately support" the aggravating circumstance. *Ake v. State,* 663 P.2d 1, 11 (Okla.Crim.App.1983), *rev'd on other grounds,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *See also, e.g., Coleman v. State,* 668 P.2d 1126, 1138 (Okla.Crim.App. 1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 986, 79 L.Ed.2d 222 (1984); *Hays v. State,* 617 P.2d 223, 231-32 (Okla. Crim.App.1980).

We agree that all of the circumstances surrounding a murder must be examined to determine whether the mur-

der was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." *Godfrey*, 428 U.S. at 429, 100 S.Ct. at 1765. Indeed, courts that have considered similar aggravating circumstances have held:

> [A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especialy heinous if the victim is aware of the impending death, and also if the killing is done without warning.

Rosen, *The Standardless Standard*, 64 N.C.L.Rev. at 989 (footnotes omitted). The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion.

In this case the court described the events surrounding the murder including the petitioner's motive for the murder, the preparation for the attack, the attack itself, and the petitioner's efforts to conceal his activities. The court then held that these events "adequately supported the jury's finding." *Cartwright v. State*, 695 P.2d at 554.

This conclusion is no different than the finding that the verdict was "factually substantiated" that was held inadequate in *Godfrey*. 446 U.S. at 419, 100 S.Ct. at 1760. We therefore hold that the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" in this case.

III.

The question remains whether this court can *sua sponte* adopt a constitutionally permissible narrowing construction of "especially heinous, atrocious, or cruel" and apply that construction to the facts of this case.

In *Godfrey*, the plurality characterized the failure of the state court to apply a proper narrowing construction as an aberrational lapse. 446 U.S. at 430-32, 100 S.Ct. at 1765-66. *But see id.* at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment) (arguing that the Georgia court had either abandoned or consistently broadened its previous narrowing construction of the statutory provision). The plurality then applied the narrowing construction usually employed by the Georgia court to the facts of the murders in that case. The Oklahoma court, on the other hand, has now explicitly denied the necessity of finding that a murder was "unnecessarily torturous to the victim." *Compare Cartwright v. State*, 695 P.2d at 554 (torture is sufficient but not necessary) *with Eddings*, 616 P.2d at 1168. ("What is intended [is] the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (The Oklahoma court has also rejected the argument that the suffering of the victim is the primary factor to be considered in deciding whether this aggravat-

ing circumstance can be applied to a particular murder. *See Nuckols*, 690 P.2d at 472; *Green*, 713 P.2d at 1044. The remaining "standards" advanced by the Oklahoma court are unconstitutionally vague. Therefore, unlike the Court in *Godfrey*, there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to the instant case.

We do not decide what narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance would satisfy the constitutional requirements. That determination must be made by the state in the first instance as it construes its own laws in light of constitutional requirements. The Supreme Court has pointedly declined the opportunity "to dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision." *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452 (emphasis original). The *Ramos* Court concluded:

> It would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate. In *Gregg* itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*. . . .
>
> Beyond these limitations, as noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

Id. at 1000-01, 103 S.Ct. at 3452-53.

We have held that the construction of the "especially heinous, atrocious, or cruel" aggravating circumstance applied by the Oklahoma Court of Criminal Appeals in this case is unconstitutionally vague. We will not presume to specify "the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision.*" *Id.* at 1000, 103 S.Ct. 3452 (emphasis original) (quoting *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934).

IV.

We make no judgment as to whether the attack in this case was "especially heinous, atrocious, or cruel." We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

The order of the District Court for the Eastern District of Oklahoma is affirmed with respect to the denial of the writ but reversed with respect to its denial of all further relief. The case is remanded to the district court with directions to enter judgment that the writ of habeas corpus is denied but, as the law and justice require,[7] the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution. The execution of the petitioner under this invalid death sentence is enjoined. This judgment is without pre-

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7. The federal habeas statute empowers the federal courts to make disposition of the matter "as law and justice require." 28 U.S.C. § 2243; *Carafas v. LaVallee*, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968); *Chaney v. Brown*, 730 F.2d 1334, 1358 (10th Cir.), *cert. denied*, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984).

judice to further proceedings by the state for redetermination of the sentence on the conviction.[8]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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8. We express no opinion concerning the constitutionality of a retroactive application of Oklahoma's new remand procedure. *See Dutton v. Brown,* 812 F.2d 593, 602 n. 10 (10th Cir.1987) (en banc), *petition for cert. filed,* 55 U.S.L.W. 3747 (U.S. May 5, 1987).